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A PROBLEM UNDER THE DECLARATION OF PARIS.—The present war has raised for the first time a neat problem under the second paragraph of the Declaration of Paris of 1856, which asserts that "the neutral flag covers enemy goods with the exception of contraband of war." [1] Under this paragraph may an English prize court condemn non-contraband German goods, which were shipped before the war, not on a neutral but on a British vessel? Was the paragraph designed merely to protect neutral trade or to exempt all private enemy property from capture at sea unless found on enemy vessels?

The history of the law as to the capture of enemy property at sea may throw some light on the true purpose of the Declaration of Paris.[2] It may be said that there are four periods during which four different rules were applied with a certain amount of consistency, always subject to vari-

[1] "Le pavillon neutre couvre la marchandise ennemie à l'exception de la contrebande de guerre." The first paragraph of the Declaration declared privateering abolished; the third provided for the immunity of neutral goods on enemy ships; and the fourth declared that blockades to be binding must be effective. For the full French text of the Declaration, with translation, see 7 MOORE'S DIGEST, 561–62; BOWLES, DECLARATION OF PARIS, 123; HIGGINS, THE HAGUE PEACE CONFERENCES, 2 ed., 1.

[2] This history will be found summarized with considerable variations as to the space devoted to the different periods by the following text-writers: HALL, INT. LAW, 6 ed., 686–94; 2 OPPENHEIM, INT. LAW, 2 ed., §§ 176–79; 2 WESTLAKE, INT. LAW, 2 ed., 137–46; 3 PHILLIMORE, INT. LAW, 3 ed., 300–69; BONFILS, MANUEL DE DROIT INTERNATIONAL PUBLIC, 7 ed., §§ 1497–1521.

ation by special treaties or by the proclamations of some individual nation. (1) From the middle of the fourteenth to the middle of the sixteenth century the rule adopted by the *Consolato del Mare* [3] was generally enforced, at least by the continental countries — that enemy goods were confiscable and neutral goods exempt wherever found. (2) For the next hundred years or so a far more stringent rule was maintained by the stronger belligerents, notably France and England, to the effect that enemy goods were confiscable wherever found and that neutral goods were also confiscable if found on enemy ships.[4] (3) During the seventeenth century a strong reaction against such a belligerent policy set in, and several states, under the leadership of the Dutch, commenced to assert the maxim of "free ships, free goods," coupled with a concession which, due to its nicely balanced jingle, was generally considered a necessary corollary — "enemy ships, enemy goods." Between 1650 and 1700 the Dutch induced other countries to sign no less than twelve treaties containing this provision.[5] England, however, never assented to this principle, but during this period, apart from a few treaties, consistently enforced the law as it had been under the *Consolato del Mare*, holding that the ownership of the goods was alone material. The movement for "free ships, free goods" culminated in the First and Second Armed Neutralities in 1780 and 1800 by which the Northern Continental nations sought to force England to change her rule. Both these leagues had but a short life owing to the inability of the individual members to resist the temptation of departing from their principles when themselves drawn into a war. (4) The fourth and last period commenced with the signing of the Declaration of Paris on April 16, 1856, by which the provisional arrangement entered into between France and England in 1854 for the purpose of conducting the Crimean War was adopted by all the signatories.[6] The Declaration exempted not only enemy property from capture in neutral ships but also neutral property in enemy ships. The only possible combination that has never been adopted as law is that which the United States has long insisted upon — complete immunity of private enemy property at sea as on land.

It is clear that in the light of this history the result of the Declaration of Paris was caused as much by a desire on the part of neutrals to protect their carrying trade in time of war as by any ideal of complete exemp-

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[3] 3 TWISS, BLACK BOOK OF THE ADMIRALTY, Chap. 231, p. 539.

[4] With France this period extended into the eighteenth century. Moreover, her famous "ordonnances" of 1543, 1681, and 1704 extended the rights of belligerents even farther and declared that not only would an enemy ship make neutral property confiscable but that a neutral ship carrying enemy property would also be condemned, *Robe d'ennemi confisque la robe d'ami.* BONFILS, 7 ed., §§ 1502–04.

[5] HALL, INT. LAW, 6 ed., 688.

[6] The Declaration was originally signed by England, France, Russia, Austria, Prussia, Turkey, and Sardinia. All other states were thereafter asked to accede to it. The only states possessing a seacoast that have withheld their formal adherence are the United States, Spain, Mexico, and Venezuela. The only reason that the United States refused to sign was because she was unwilling to give up her privateering rights under the first paragraph unless the signatories would carry their reform further under the second and third paragraphs and accept the so-called Marcy Amendment, exempting all private enemy property at sea, except contraband. The Declaration was adhered to, moreover, by both sides in the Spanish-American war, as it was in the Russo-Japanese war, and is generally regarded as binding international law. See 2 WESTLAKE, 145.

tion of enemy property at sea.[7] This theory is borne out by the second paragraph of the Declaration's preamble.[8] Many commentators have also taken this view of the Declaration.[9] Under these circumstances the Judicial Committee of the Privy Council cannot with justice be criticised for adhering strictly to the wording of the second paragraph and holding in a recent case that private enemy property shipped before the war in a British vessel was not exempt. *The Roumanian*, 114 L. T. R. 3. The court was able, moreover, to refer to an elaborate *dictum* by Sir Samuel Evans in another recent case.[10]

On the other hand, considerations which might have led the court to a different conclusion cannot be overlooked. The result of this paragraph of the Declaration has been popularly expressed in the broader formula of "free ships, free goods," as we have seen, and the ship in question could well be argued to be "free." The wording of the paragraph in the terms of a familiar fiction as to the ship's flag might justify a conclusion that these goods, since not on an enemy ship, should be treated as though taken in the country whose flag the ship was flying.[11] Moreover, the Declaration of Paris has been regarded by many as laying down a general rule for the immunity of all private enemy property from capture at sea, from which the case of enemy property on enemy ships is alone excepted.[12] It is the more likely that this was the purpose of some of the continental signatories of the Declaration owing to the strength which Rousseau's doctrine had gained during the first half of the nine-

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[7] This is particularly clear from a consideration of the agitation by the Dutch during the third period and of the activities of the Armed Neutralities.

[8] " . . . that the uncertainty of the law and of the duties in such a matter, gives rise to differences of opinion *between neutrals and belligerents* which may occasion serious difficulties, and even conflicts." 7 MOORE'S DIGEST, 561 (italics ours).

[9] Sir Travers Twiss says that its motive "was a desire to render war, as a state of international relations, as little onerous as possible to neutrals." BELLIGERENT RIGHT ON THE HIGH SEAS SINCE THE DECLARATION OF PARIS, 3. Mr. Seward wrote of it to Mr. Adams as "endeavoring to effect some modifications of the law of nations in regard to the rights of neutrals in maritime war." 7 MOORE'S DIGEST, 570.

[10] The Miramichi, 112 L. T. R. 349, 352. There is another *dictum* in accord with the present case. The Mashona, 10 Cape Times L. R. 163, 178. In that case the goods had been shipped after the war, so the vessel was not innocent as in the present case, owing to the prohibition against trading with the enemy.

[11] Private property of the enemy found in the country at the outbreak of war is never confiscated, though the United States has always been careful to assert that the right existed, but that it should never be exercised. Wolff *v.* Oxholm, 6 M. & S. 92; Brown *v.* U. S., 8 Cranch 110; SCOTT'S CASES ON INTERNATIONAL LAW, 481–97.

[12] Thus, President Pierce in his annual message to Congress on December 2, 1856, in explaining why the United States would not accede to the Declaration, said: "Their proposition was doubtless intended to imply approval of the principle that private property upon the ocean, although it might belong to the citizens of a belligerent state, should be exempted from capture; and had that proposition been so framed as to give full effect to the principle, it would have received my ready assent on behalf of the United States." 7 MOORE'S DIGEST, 564. See also HAUTEFEUILLE, QUELQUES QUESTIONS DE DROIT INTERNATIONAL MARITIME, 59 (1861): "Depuis le commencement du dix-septième siècle, toutes les nations ont reconnu que l on devait agir sur l'océan de la même manière qu'à terre." There is apparently no evidence to be gained as to the motives behind the Declaration from the deliberations of the plenipotentiaries. It was signed eight days after it was proposed by Count Walewski. See BOWLES, THE DECLARATION OF PARIS, Chap. XII. Any discussion there may have been was kept secret, together with the other deliberations of the Congress. See GOURDON, HISTOIRE DU CONGRÈS DE PARIS, 113, 485–86.

teenth century — that war is a relation between states and not between the private individuals composing the states.[13] As the result of all these reasons, at least one English authority on international law has stated the effect of the Declaration in its broadest terms.[14]

But it is not surprising that, in spite of all these arguments, the English court was unwilling to take any step which would in the least extend the scope of the Declaration of Paris, when the conventional English attitude toward the Declaration is borne in mind.[15] The United States, on the other hand, would naturally be disappointed with anything but the broadest possible interpretation of the Declaration, in view of the fact that this country has for over a hundred years contended unswervingly for the complete immunity of private property at sea, and that England is virtually the only country which is still firmly opposed to this principle.[16]

THE NATURE OF THE STOCKHOLDER'S LIABILITY FOR STOCK ISSUED AT A DISCOUNT. — When a corporation issues its stock at a discount, the original holder has been held liable to creditors of the corporation, in the event of insolvency, for the difference between the par value and the amount actually paid in, if that amount is needed to satisfy its creditors.[1] Various theories have been advanced to explain this result. Under the "trust fund" theory, the capital stock, including unpaid balances on

[13] A good account of the development of this theory on the continent and its reception by England and the United States is given by F. R. Stark, 8 COLUMBIA STUDIES IN HISTORY, ECONOMICS, AND PUBLIC LAW, [232–57]. Hall, on the other hand, virtually brands the doctrine as a mere fiction invented to attack the legality of private enemy property at sea. HALL, INT. LAW, 6 ed., 63–70. See also Dana's Note 171 to WHEATON.

[14] "We may therefore conclude that enemy ships and enemy goods on board them are now, by international law, the only enemy property which, as such, is capturable at sea." 2 WESTLAKE, 145.

[15] This attitude is exemplified by Mr. Bowles' book on the Declaration of Paris referred to above. An idea of his point of view may be gathered from the title of Chap. XII — "The Declaration of Paris — Unauthorized — Contradictory — False — And no Part of the Law of Nations." For an admirable defense of this part of the Declaration, see 144 EDINBURGH REVIEW, 353, 358–69 (1876).

[16] As early as 1785 the United States concluded a treaty with Prussia providing for the immunity of all private property at sea. She made the same proposition in 1823 to England, Russia, and France. She contended for the same doctrine in the Marcy Amendment after the Declaration of Paris. On the continent, Italy in 1865 incorporated the doctrine in her marine code and concluded a treaty on this basis with the United States in 1871. Austria and Prussia asserted the doctrine in their war of 1866. Prussia announced it at the outbreak of the Franco-Prussian war. See HALL, INT. LAW, 6 ed., 438–39, 441, [n. 1; 7 MOORE'S DIGEST, 461 *et seq.* Even in England the best opinion is not all in favor of the old belligerent rule. For a good statement of England's arguments against the new doctrine, based on the theory that her naval supremacy would be rendered useless, see Sir Edward Grey's instructions to the English delegates to the Hague Conference in 1907. HIGGINS, THE HAGUE PEACE CONFERENCES, 2 ed., 619–21. For the arguments on the other side, based on the growth of England's commerce, her dependence on it, and the danger of the malevolent neutrality of continental nations if her attitude continues, see 26 CONTEMPORARY REV. 735, 737–51 (1875); LOREBURN, CAPTURE AT SEA, Chaps. II and III.

[1] Scovill *v.* Thayer, 105 U. S. 143. See WARREN, CASES ON CORPORATIONS, 2 ed., 221.